

No. 14460

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United States  
Court of Appeals  
for the Ninth Circuit.

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JUNSO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of  
the United States,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Hawaii.

FILED

DEC 6 1954

PAUL P. O'BRIEN, ✓



No. 14460

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United States  
Court of Appeals  
for the Ninth Circuit.

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JUNSO FUJII,

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit in Support of Motion to Dismiss . . . .	12
Amended and Supplemental Complaint . . . . .	6
Certificate of Clerk . . . . .	31
Complaint . . . . .	3
Docket Entries . . . . .	28
Minute Entries	
March 17, 1954 . . . . .	14
March 19, 1954 . . . . .	15
April 20, 1954 . . . . .	16
April 21, 1954 . . . . .	17
Motion to Dismiss . . . . .	11
Names and Addresses of Attorneys . . . . .	1
Notice of Appeal . . . . .	30
Notice of Motion for Leave to Correct Amended and Supplemental Complaint . . . . .	13
Notice of Motion for Leave to File Supple- mental Portions of Amended and Supple- mental Complaint . . . . .	9
Order of Dismissal . . . . .	17
Ruling on Motion to Dismiss . . . . .	18
Statement of Points Upon Which Appellant Intends to Rely on Appeal . . . . .	33



## NAMES AND ADDRESSES OF ATTORNEYS

For the Plaintiff, Junso Fujii:

FONG, MIHO, CHOY & CHUCK,  
197 South King Street,  
Honolulu 13, Hawaii,

A. L. WIRIN, ESQ., and  
FRED OKRAND, ESQ.,  
257 South Spring Street,  
Los Angeles 12, California.

For the Defendant, John Foster Dulles, Secretary  
of State of the United States of America:

A. WILLIAM BARLOW, ESQ.,  
United States Attorney,  
District of Hawaii and,

LOUIS B. BLISSARD, ESQ.,  
Assistant United States Attorney, District  
of Hawaii,  
Federal Building.  
Honolulu, T. H.





In the District Court of the United States for the  
District of **Hawaii**

Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of  
the United States of America,

Defendant.

Proceedings Under Section 503 United States Na-  
tionality Act of 1940 (8 USCA Section 903)

COMPLAINT

Comes now Junso Fujii, Plaintiff above named,  
and complaining of Defendants above named, shows  
as follows:

I.

That the Plaintiff is a citizen of the United States  
of America by virtue of his birth at Honolulu, City  
and County of Honolulu, Territory of Hawaii, on  
August 30, 1911; that the Plaintiff is at present  
residing at #22 Saiku-machi, Hiroshima-shi, Japan;  
that the Plaintiff claims the Territory of Hawaii  
as his permanent residence and intends to reside  
therein.

II.

That the Defendant, John Foster Dulles, is the  
Secretary of State of the United States of America;  
that the United States Department of State is an  
agency of the United States Government; and that

the United States Foreign Service is a part of the United States Department of State.

### III.

That the Plaintiff last resided in the United States of America at Honolulu aforesaid; that he left the United States on [4\*] May 2, 1939, and has resided in Japan since that date; and that the Plaintiff is at present married and has three (3) children.

### IV.

That from March 24, 1945, to February 8, 1946, the Plaintiff served in the Japanese Armed Forces.

### V.

That quite sometime ago, the Plaintiff executed a Petition addressed to the American Consular Service at Kobe, Japan, for the purpose of securing a passport in order that said Plaintiff might come to the Territory of Hawaii from Japan as an American citizen; that said Petition was supported by the necessary documents and affidavits; that all of the requests of the said American Consulate for information as to the Plaintiff's citizenship have been complied with to the best of the Plaintiff's ability; that the Plaintiff made inquiries of the said American Consulate as to the status of said Petition, but no determination has as yet been made by said Consulate as to said Petition.

### VI.

That the non-action and inexcusable delay upon the part of said Consulate to issue to the said Plain-

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

tiff said passport is a denial of the Plaintiff's rights and privileges as a United States citizen.

## VII.

That the Plaintiff's service in the Japanese Armed Forces was not his free and voluntary act.

## VIII.

That as a result of said non-action, the Plaintiff is not able to enter the United States and such is a denial of his rights and privileges as a United States citizen. [5]

## IX.

That the Plaintiff claims that he is a United States citizen by virtue of the fact that he was born in the United States of America; that he is entitled to establish and to have this Court declare his United States Nationality under Section 503 of the United States Nationality Act of 1940; that as a citizen and national of the United States, he is entitled to a United States passport and to enter and reside in the United States.

Wherefore, Plaintiff prays for a judgment and decree adjudging that he is a citizen and/or national of the United States of America, and as such, is entitled to the rights and/or privileges of a citizen and/or national of the United States, including the right to be issued a United States passport and a right to enter and reside in the United States of America.

Dated at Honolulu, T. H., this 16th day of December, A.D. 1952.

JUNSO FUJII,  
Plaintiff.

By A. L. WIRIN, FRED OKRAND and FONG,  
MIHO, CHOY & CHUCK,  
His Attorneys,

By /s/ WALTER G. CHUCK.

Duly Verified.

[Endorsed]: Filed December 16, 1952. [6]

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[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COMPLAINT PURSUANT TO 8 USC 903, 8 USC 1503(a) AND 28 USC 2201

Comes now Plaintiff above named, files this pleading as of course, pursuant to Rule 15(a), Federal Rules of Civil Procedure, no responsive pleading having been served, and alleges:

I.

Plaintiff is a citizen of the United States. He was born at Honolulu, Territory of Hawaii, on August 30, 1911. He claims the Territory of Hawaii, within the jurisdiction of this Court, as his permanent residence. At the time this suit was filed, Plaintiff was temporarily residing in Japan. Plaintiff is now within the United States, in the Territory of

Hawaii, arriving on February 18, 1953, on a Certificate of Identity executed by the Vice Consul, pursuant to the provisions of 8 USC 903, on January 14, 1953, and issued to the Plaintiff on January 28, 1953. [9]

## II.

Defendant, John Foster Dulles, is the Secretary of State of the United States. As such he is the head of the Department of State of the United States.

## III.

Plaintiff served in the Armed Forces of Japan from March 24, 1945, to February 8, 1946. Said service was not the free or voluntary act of Plaintiff, but was as the result of duress and coercion.

## IV.

On or about October 17, 1952, Plaintiff applied at the office of the American Vice-Consul, Kobe, Japan, for registration as a citizen of the United States. Said application for registration was denied Plaintiff by said Vice-Consul on the ground that Plaintiff had lost his United States citizenship under 8 USC 801(c) by reason of the aforesaid service in the Japanese Armed Forces, and instead, on November 20, 1952, said Vice-Consul executed under his official seal as Vice-Consul of the United States a Certificate (as to Plaintiff) of the Loss of the Nationality of the United States on the ground aforesaid. Said action of the Vice-Consul in Kobe, Japan, was approved by the Washington office of the Department of State on March 18, 1953.

In so acting, the American Vice-Consul at Kobe, as well as the Washington office of the Department of State, acted as the agents of and for and on behalf of the Defendant and his predecessor in office. In so acting, said persons denied to Plaintiff a right and privilege as a citizen and national of the United States. [10]

Wherefore, Plaintiff prays for a judgment declaring that he is a citizen and national of the United States and that he did not lose his United States citizenship pursuant to 8 USC 801(c) by reason of his service in the Japanese Armed Forces.

Dated at Honolulu, T. H., this 15th day of March, A.D. 1954.

JUNSO FUJII,  
Plaintiff.

By FONG, MIHO, CHOY & CHUCK and A. L.  
WIRIN and FRED OKRAND,  
His Attorneys.

By /s/ FRED OKRAND.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1954. [11]



[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL PORTIONS OF  
AMENDED AND SUPPLEMENTAL COM-  
PLAINT

To the Defendant above named: to his attorney, A.  
William Barlow, United States Attorney, and  
Louis B. Blissard, Assistant United States At-  
torney:

Please Take Notice: On the 19th day of March,  
1954, at the hour of 9:00 a.m., or as soon thereafter  
as counsel may be heard in the Courtroom of the  
Honorable J. Frank McLaughlin, Judge of the  
above-entitled Court, Plaintiff will move the Court  
for leave to file the following portions of the  
Amended and Supplemental Complaint, heretofore  
presented to the court:

From Paragraph I:

“Plaintiff is now within the United States, in  
the Territory of Hawaii, arriving on February 18,  
1953, on a Certificate of Identity executed by the  
Vice-Consul, pursuant to the provisions of 8 USC  
903, on January 14, 1953, and issued to the Plain-  
tiff on January 28, 1953.”

From Paragraph IV:

In first paragraph thereof: [13]

“Said action of the Vice-Consul in Kobe, Japan,  
was approved by the Washington office of the De-  
partment of State on March 18, 1953.”

In the second paragraph thereof:

“as well as the Washington office of the Department of State.”

Said motion will be made on the ground that said matter occurring subsequent to the filing of the Complaint should be before the Court in this litigation.

Said motion will be based upon Rule 15(d), Federal Rules of Civil Procedure, and upon all the records and files in this case.

Dated at Honolulu, T. H., this 18th day of March, A.D. 1954.

JUNSO FUJII,  
Plaintiff.

By FONG, MIHO, CHOY & CHUCK and A. L.  
WIRIN & FRED OKRAND,  
His Attorneys.

By /s/ FRED OKRAND.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1954. [14]



In the United States District Court for the  
District of Hawaii  
Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of  
the United States of America,

Defendants.

MOTION TO DISMISS

Comes now John Foster Dulles, Secretary of State of the United States of America, Defendant above named, by his attorney, A. William Barlow, United States Attorney for the District of Hawaii, and moves that the Amended Complaint herein be dismissed on the grounds that this court lacks jurisdiction over the subject matter. The affidavit of Louis B. Blissard, Assistant United States Attorney for the District of Hawaii, filed herein on March 12, 1954, is incorporated herein by reference and made a part hereof.

Dated: Honolulu, T. H., this 23rd day of March, 1954.

A. WILLIAM BARLOW,  
United States Attorney, District of Hawaii, At-  
torney for Defendants.

By /s/ LOUIS B. BLISSARD,  
Assistant United States At-  
torney, District of Hawaii.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 23, 1954. [16]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO  
DISMISS

Territory of Hawaii,  
City and County of Honolulu—ss.

Louis B. Blissard, being first duly sworn on oath,  
deposes and says:

That he is an Assistant United States Attorney  
for the District of Hawaii;

That he has been informed by the Secretary of  
State of the United States and therefore states the  
fact to be that Junso Fujii filed an Application for  
Registration as an American citizen on October 17,  
1952, with the American Vice-Consul, Kobe, Japan;

That on November 20, 1952, the said American  
Vice-Consul, after interview, investigation, and rec-  
ord check, wrote an opinion in which he stated that  
it was his belief that the applicant had lost his  
claim to American citizenship; that the said Vice-  
Consul certified the facts upon which such belief  
was based to the Department of State, such report  
being contained in a Certificate of the Loss of the  
Nationality of the United States, all in accordance  
with the provisions of Section 501 of the Nationality  
Act of 1940, (8 USC Section 901) and regulations  
issued by the Secretary of State pursuant thereto;

That the aforesaid opinion and certificate were  
received by the Department of State, Passport Di-  
vision, on December 18, 1952, two days after this  
suit was filed;

That the aforesaid report or certificate was approved by the Secretary of State on March 18, 1953;

That the Application for Registration was refused on March 20, 1953;

That a copy of the Certificate of the Loss of the Nationality of the United States was thereupon forwarded to the applicant, Junso Fujii, plaintiff herein.

Further affiant sayeth not.

/s/ LOUIS B. BLISSARD.

Subscribed and sworn to before me this 12th day of March, 1954.

[Seal]      /s/ E. L. KAANEKE,  
Deputy Clerk, United States  
District Court.

Endorsed]: Filed March 12, 1954.

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO COR-  
RECT AMENDED AND SUPPLEMENTAL  
COMPLAINT

To the Defendants Above Named, and his attorneys,  
A. William Barlow, United States Attorney,  
and Louis B. Blissard, Assistant United States  
Attorney,

Please Take Notice, that:

On the 19th day of April, 1954, in the courtroom  
of the Honorable J. Frank McLaughlin, Judge of

the above-entitled Court, at the hour of 9:00 o'clock a.m., or as soon thereafter as counsel may be heard, Plaintiff will move the court for leave to correct the last sentence of the first paragraph of Paragraph IV of the amended and Supplemental Complaint so as to read:

“Said action of the Vice-Consul in Kobe, Japan, was approved by the Washington office of the Department of State on December 18, 1952.”

The effect of this amendment is to change so much of said sentence as reads “March 18, 1953,” so that it reads [18] “December 18, 1952.”

Dated at Honolulu, T. H., this 17th day of April, A.D. 1954.

FONG, MIHO, CHOY & CHUCK,  
A. L. WIRN & FRED OKRAND,

By /s/ FRED OKRAND,  
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 19, 1954. [19]

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[Title of District Court and Cause.]

MINUTES—WEDNESDAY, MARCH 17, 1954

On this day came Mr. Fred Okrand of the firm of Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States District Attorney, counsel for the

defendant herein, this case being called for hearing on amended and supplemental complaint.

Upon Mr. Blissard's statement that the amended and supplemental complaint does not comply with the provisions of Rule 15(d) of the Federal Rules of Civil Procedure and following argument thereon, the Court informed counsel that the pleading has been filed out of order and that counsel may cure same by filing a motion for leave to file same.

The Court informed counsel that hearing on the motion to dismiss will be held in abeyance in the meantime. [20]

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[Title of District Court and Cause.]

#### MINUTES—FRIDAY, MARCH 19, 1954

On this day came Mr. Fred Okrand of the firm Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States District Attorney, counsel for the defendant herein, this case being called for hearing on notice of motion for leave to file supplemental portions of amended and supplemental complaint.

Upon request of Mr. Okrand, the Court ordered this case continued until the return of Mr. Okrand from Japan. [21]



[Title of District Court and Cause.]

MINUTES—TUESDAY, APRIL 20, 1954

On this day came Mr. Katsuro Miho of the firm Fong, Miho, Choy & Chuck, and Mr. Fred Okrand of the firm Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States Attorney, counsel for the defendant herein, this case being called for hearing on motion by plaintiff for inspection of documents, motion for leave to file supplemental portions of amended and supplemental complaint, motion for leave to correct amended and supplemental complaint, and motion to dismiss.

Following argument by respective counsel on the motion for inspection of documents, the Court held that the plaintiff was entitled to inspect the documents as requested and such other documents that may have been voluntarily submitted with his application for a passport or certificate of identity.

At 2 p.m., motion for leave to correct amended and supplemental complaint was allowed by the Court in view of Mr. Okrand's assertion and the fact that the plaintiff is now in the Territory of Hawaii.

Further argument was then had by Mr. Okrand on motion for leave to file supplemental portions of amended and supplemental complaint.

At 4 p.m., the Court ordered this case continued to April 21, 1954, at 9 a.m., for further [22] argument.

[Title of District Court and Cause.]

MINUTES—WEDNESDAY, APRIL 21, 1954

On this day came Mr. Katsuro Miho of the firm Fong, Miho, Choy & Chuck, and Mr. Fred Okrand of the firm Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States Attorney, counsel for the defendant herein, this case being called for further hearing on motion for leave to file supplemental portions of amended and supplemental complaint and on motion to dismiss.

Following argument by Mr. Blissard and further argument by Mr. Okrand, the Court granted the motion to dismiss for lack of jurisdiction. [23]

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In the United States District Court for the  
District of Hawaii

Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of  
the United States of America,

Defendant.

ORDER OF DISMISSAL

The Motion to Dismiss of the defendant, John Foster Dulles, having come on to be heard before

the Court on April 21, 1954; the petitioner having been represented by his counsel, Fred Okrand, Esquire, and Katsuro Miho, Esquire, and the defendant having been represented by Louis B. Blissard, Esquire, Assistant United States Attorney of this District; the motion having been fully argued and submitted to the Court for decision; the Court having found the motion to be well taken on the ground stated therein, namely that the Court lacks jurisdiction over the subject matter.

Now Therefore, it is hereby ordered, adjudged and decreed that this cause and the petition herein be and the same are dismissed.

Dated: Honolulu, T. H., this 24th day of May, 1954.

/s/ J. FRANK McLAUGHLIN,  
Judge of the Above-Entitled  
Court.

No Objection as to Form.

/s/ FRED OKRAND.

[Endorsed]: Filed May 24, 1954. [25]

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[Title of District Court and Cause.]

#### RULING ON MOTION TO DISMISS

The plaintiff has filed this timely action under Section 503 of the Nationality Act of 1940, 8 U.S.C. §903, petitioning this court for judgment declaring him to be a citizen of the United States.



The original complaint was filed December 16, 1952, and alleged that the plaintiff was a citizen of the United States by virtue of his birth in Honolulu, T. H., on August 30, 1911, but that he left the United States on May 2, 1939, to go to Japan, and has resided there ever since. It was alleged also that from March 24, 1945, to February 8, 1946, the plaintiff served in the Japanese Armed Forces, although that service was not his free and voluntary act, and

“That quite some time ago, the Plaintiff executed a Petition addressed to the American Consular Service at Kobe, Japan \* \* \*” for a passport, but that no action had been taken on the petition and that the “non-action and inexcusable delay” by the consulate constituted a denial of the plaintiff’s rights and privileges within the meaning of 8 U.S.C. § 903.

Subsequently, on March 15, 1954, the plaintiff filed an amended complaint in which it was alleged as follows:

1. That what the plaintiff had sought on the above occasion was actually registration as an American citizen and this was done [27] on October 17, 1952.

2. That this application was denied on November 20, 1952, when the Vice-Consul executed a Loss of Nationality Certificate relating to the plaintiff by reason of his service in the Japanese Armed Forces.

3. That such constituted a denial within the meaning of Section 903.

To both of these complaints, the defendant filed a motion to dismiss. At the hearing on the latter, the following additional facts were adduced: First, that at the time of the filing of the original complaint, the plaintiff was unaware that the Vice-Consul had, on November 20, 1952, executed a Loss of Nationality Certificate and forwarded the same to the State Department in Washington, D. C., in accordance with 8 U.S.C. § 901; secondly, that on December 18, 1952, the State Department sent a telegram to the American Consul at Kobe, approving a number of Certificates executed by him, one of which was the plaintiff's. (This Certificate was formally approved by the State Department March 18, 1953, and the plaintiff's application denied by the United States Consul in Kobe March 20, 1953.)

The original complaint depends for its validity upon the theory that the denial necessary for an action under 8 U.S.C. § 903 resulted from the "inexcusable delay" by the Consulate in processing the plaintiff's application. Section 903 states that the claimant must be denied a right or privilege as a national of the United States "upon the ground that he is not a national of the United States \* \* \*". Without alleging such a basis for the denial, the plaintiff states no claim within the meaning of the Nationality Act of 1940, 8 U.S.C. § 903. *Dulles* [28] v. *Lee Gnan Lung*, No. 13,695, 9th Cir., March 30, 1954; *Yoichi Fujii v. Dulles*, Civil No. 1300, D. Hawaii, May 28, 1954. Merely alleging delay without alleging the denial to have been rested upon this

ground is insufficient for the purposes of the statute, for the delay may be occasioned by reasons other than that the applicant is not a national of the United States. *Jack Len Lee, Guardian ad litem for Sing Hoon Lee and Sing Yuen Lee, v. Dulles*, Civil No. 1188, D. Hawaii, June 1, 1954.

While delay by the Government in granting the right petitioned for may well be, in effect, a denial of that right, this delay must have been of unreasonable duration in order to call this principle into operation. In view of the nature of these claims, and the time needed for their processing, the two-months' delay complained of here would clearly not be of unreasonable length, even if it were alleged to have been founded on plaintiff's lack of nationality—an allegation which does not appear in this original complaint.

Therefore, the original complaint fails to state a claim upon which relief can be granted, and does not effectively invoke the jurisdiction of this court.

The amended complaint proceeds upon the theory of an express denial. It is therein alleged that the execution on November 20, 1952, of the Loss of Nationality Certificate constituted a denial of the plaintiff's rights within the meaning of Section 903. This position is untenable and it is unnecessary to decide whether it is the execution by the Consul of this document or its approval by the State Department in Washington, D. C., which is the denial, for the Consul's action is certainly not a denial when it is

uncommunicated to the plaintiff prior to the filing of the complaint. *Hitaka Suda v. Dulles*, Civil No. 1302, D. Hawaii, April 26, 1954. [29]

Thus, the first event in this case which could conceivably qualify as a denial for the purposes of the statute is the telegraphic approval by the State Department of this Certificate on December 18, 1952, two days after the filing of the complaint; this allegation is sought to be added to the amended complaint supplementally. Even if this request be granted, this fact does not avail the plaintiff, because it occurred subsequent to the filing of the complaint and is ineffectual to relieve that document's invalidity or its prematurity.

There is merit in the contention of the defendant that inasmuch as the original complaint fails to comply with Rule 8(a) of the Federal Rules of Civil Procedure, all amendatory and supplemental material should be precluded on the ground that there is nothing in being possessing legal spark and life to be amended or supplemented, and it is sought to be added after the statutory basis for such an action has been repealed by Congress. However, this court will allow the amendments and supplements inasmuch as the amended complaint was filed pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, and it having been held thereunder that a motion to dismiss is not a responsive pleading. *Kelly v. Delaware River Joint Commission*, 187 F.2d 93, 94 (3rd Cir. 1951), cert. denied, 342 U.S.

812 (1951); *United States v. Newbury Mfg. Co.*, 123 F.2d 453 (1st Cir. 1941).

As noted before, however, there still are no facts alleged here upon which a valid denial can be predicated prior to the filing of the original complaint.

In order to preserve his right of action, the plaintiff seeks to invoke the Saving Clause, Section 405 of the Immigration and Nationality Act, 8 U.S.C. § 1101 note. That section provides in part: [30]

“Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed \* \* \* to affect any prosecution, suit, action, or proceedings, civil or criminal, \* \* \* or any \* \* \* right in process of acquisition, \* \* \* done or existing, at the time this Act shall take effect; \* \* \*”

The plaintiff argues that even if the original complaint be held invalid, he still initiated a suit, action, or proceeding within the meaning of the Saving Clause and consequently the applicable provisions of the 1940 Act are continued in full force and effect.

However, the Saving Clause presupposes a valid suit, or a valid action. Here the original complaint is a nullity, and there is in effect nothing to save.

The plaintiff further contends that his right of action is protected under the Saving Clause as a “right in process of acquisition.” It has been held that this phrase is inapplicable to a mere right to



bring a declaratory action under 8 U.S.C. § 903. The existence of the cause of action, without more, does not amount to a right within the meaning of the Saving Clause; it is only a remedy which Congress has the power to change or abolish. *Avina v. Brownell*, 112 F.Supp. 15 (S.D. Tex. 1953).

This court has held before in *Miyoko Ishida v. Dulles*, Civil No. 1250, D. Hawaii, April 21, 1954:

“And expressly on the ground of the motion to reconsider do I hold that the Saving Clause does not here avail this plaintiff for the right in the process of acquisition that this plaintiff was pursuing at the time the statute expired was a right not to a declaratory judgment of citizenship but was an administrative procedure seeking thereunder a passport. Implied in that holding is the fact that rights are to be distinguished from remedies, and that the remedy being statutory it can be obliterated by Congress at any time it sees fit, before same ripened into judgment or as preserved by a Saving Clause by reason of having been actually invoked. No judicial step was ever taken because the plaintiff was not eligible during the life of the statute to preserve the judicial remedy under the Saving Clause.

“Accordingly, the phrase ‘Right in the [31] process of acquisition’ is inapplicable here \* \* \*”

The plaintiff cites in opposition to this argument the cases of *Petition of Menasche*. 115 F.Supp. 434

(D. Puerto Rico, 1953), *aff'd.* 210 F.2d 809 (1st Cir. 1954); and *In re Joeson*, 117 F.Supp. 528 (D. Hawaii 1954); wherein the Saving Clause was held to be applicable. There the plaintiffs had, as aliens, initiated steps toward their naturalization as American citizens under the Nationality Act of 1940 and sought approval of their petitions subsequent to its repeal. The courts held that the initiation of the process for citizenship gave to the petitioners rights in process of acquisition within the meaning of the Saving Clause, and consequently the latter continued the applicable provisions of the 1940 Act in full force and effect.

This court does not disagree with those principles; however, we would say that not only must affirmative action to comply with the statutory requirements be commenced, but it must be begun in a valid manner before it can be said that the plaintiff has a right-in-process-of-acquisition to which the Saving Clause can apply. See *United States v. Menasche*, *supra*. Nothing short of this will preserve a plaintiff's statutory remedy under the Nationality Act of 1940 subsequent to its repeal. Under that statute, both *Joeson* and *Menasche* validly complied with the statutory provisions necessary to the attainment of their judicial right, viz., naturalization. On the other hand, in order to obtain the judicial right subsequently sought by this plaintiff (he initially sought administrative relief only), he had to file a suit pursuant to 8 U.S.C. § 903 and in accordance with the rules of federal pleading. Failing in this, he

likewise failed to acquire a right in process of acquisition which the Saving Clause in the 1952 Act would protect. [32]

The Saving Clause is admittedly broad, but does not avail one such as this plaintiff who had not prior to December 24, 1952, the date of the repeal of the Nationality Act of 1940, stated a valid claim within the meaning of Rule 8 of the Federal Rules of Civil Procedure.

Lastly, the plaintiff contends that the counterpart of 8 U.S.C. § 903 in the Immigration and Nationality Act (1952), i.e., 8 U.S.C. § 1503(a) is here applicable. This section provides in part:

“If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action \* \* \*” (Emphasis added).

This does not help this plaintiff, because it seems clear that since the Immigration and Nationality Act (1952) provides a new statutory cause of action, this Act cannot be invoked unless an action thereunder was instituted subsequent to its enactment and while the claimant was in the United States. *Teruo Tamada v. Dulles*, Civil No. 1273, D. Hawaii, April 23, 1954. That decision disposes of the same contention in the instant case, since this complaint



was filed before the new statutory cause of action arose.

We are aware of the existence of other questions which have only an indirect bearing on this case. One question is whether or not a plaintiff present in the United States under authority of a Certificate of Identity, issued under the old Act and Regulations, has standing to prosecute any action other than that for which his certificate was issued. 8 U.S.C. § 903, 22 C.F.R. § 50.18, et seq. Another arises under the new Act, which seems to say that in order to state a cause of action now, a plaintiff must show that any denial of a right or privilege as a national, on the ground that he is not a national, [33] had occurred while he was in the United States. These, however, need not be decided here.

For the reasons herein contained, we hold that the plaintiff has failed to comply with Rule 8 of the Federal Rules of Civil Procedure, and the defendant's motion to dismiss is therefore granted.

Dated at Honolulu, Hawaii, this 23rd day of June, 1954.

/s/ J. FRANK McLAUGHLIN,  
United States District Judge.

[Endorsed]: Filed June 23, 1954. [34]

[Title of District Court and Cause.]

### DOCKET ENTRIES

Date Filings-Proceedings

1952

Dec. 16—Filing Complaint. Issuing Summons. Certifying 4 copies for service. (6 pages ea.)

Dec. 22—Filing U. S. Marshal's Return on Service of Writ (served).

1953

Feb. 6—Filing Motion to Dismiss and Memorandum of Points and Authorities.

1954

Mar. 12—Filing Affidavit in Support of Motion to Dismiss.

Mar. 12—Notice of Motion filed.

Mar. 15—Amended and Supplemental Complaint pursuant to 8 USC 903, 8 USC 1503(a) and 28 USC 2201 filed.

Mar. 17—Entering proceedings—objections to filing of amended and Supplemental Complaint by Blissard. Arguments by Counsel—Oral Ruling—Plaintiff to file Motion for Leave to File, etc.—Motion to Dismiss continued.

Mar. 18—Notice of Motion for Leave to File Supplemental Portions of Amended and Supplemental Complaint filed.

Mar. 19—Entering proceedings—Motion for leave to file, etc.—continued until the return of Okrand from Japan.

1954

Mar. 23—Motion to Dismiss filed.

Apr. 19—Filing Notice of Motion by Plaintiffs for Inspection of Documents.

Apr. 19—Notice of Motion for Leave to Correct. Amended and Supplemental Complaint filed.

Apr. 20—Entering proceedings at hearing on motion for inspection of documents, etc. Arguments—Motion for Inspection of Documents granted—Motion to correct amended and supplemental complaint — allowed — continued to April 21, 1954, at 9 a.m.

Apr. 21—Entering proceedings at further hearing on motion for leave to file supplemental portions of amended complaint, etc. Further arguments — Motion to Dismiss — Granted—Lack of Jurisdiction.

May 10—Copy of Reporter's Transcript—Oral Decision on Motions for Inspection of Documents—filed in Civil No. 1273.

May 24—Order of Dismissal filed. [35]

June 23—Ruling on Motion to Dismiss filed.

July 1—Notice of Appeal; Designation of Record on Appeal and Statement of Points Upon Which Appellant Intends to Rely on Appeal filed.

July 8—Designation of Record on Appeal filed. [36]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Junso Fujii, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order dismissing the complaint entered in this action on May 24, 1954.

Dated: July 1, 1954.

FONG, MIHO, CHOY and  
CHUCK,

A. L. WIRIN &  
FRED OKRAND,

By /s/ FRED OKRAND,  
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 1, 1954. [38]

In the United States District Court  
for the District of Hawaii

Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of  
the United States of America,

Defendant.

CERTIFICATE OF CLERK

United States of America,  
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk, U. S. District Court for the District of Hawaii, do hereby certify that the record on appeal in the above-entitled cause consists of a statement of the names and addresses of the attorneys of record, and of the various original pleadings and other papers as hereinbelow listed and indicated:

Original Pleadings

Complaint.

Amended and Supplemental Complaint Pursuant to 8 USC 903, 8 USC 1503(a) and 28 USC 2201.

Notice of Motion for Leave to File Supplemental Portions of Amended and Supplemental Complaint.

Motion to Dismiss.

Notice of Motion for Leave to Correct Amended and Supplemental Complaint. [43]

Order of Dismissal.

Ruling on Motion to Dismiss.

Notice of Appeal.

Designation of Record on Appeal.

Designation of Record on Appeal.

I further certify that included in said record on appeal is a copy of the Minutes of Court of March 17, 1954; March 19, 1954; April 20, 1954, and April 21, 1954, and Docket Entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this . . . . day of July, A.D. 1954.

[Seal]

WM. F. THOMPSON, JR.,  
Clerk. [44]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL

Appellant herewith, pursuant to Rule 75(d), Federal Rules of Civil Procedure, hereby states the following as the points upon which he intends to rely on appeal:

1. The Court has jurisdiction over the subject matter.
2. The Court erred in dismissing the cause and the petition.

Dated: July 1, 1954.

FONG, MIHO,  
CHOY & CHUCK,  
A. L. WIRIN, &  
FRED OKRAND,

By /s/ FRED OKRAND,  
Attorneys for Appellant.

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[Endorsed]: No. 14,460. United States Court of Appeals for the Ninth Circuit. Junso Fujii, Appellant, vs. John Foster Dulles, Secretary of State of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed July 29, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

